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 10 MIGUEL ORTEGA AND BENJAMIN ORTEGA

8 IN THE UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA

11 MIGUEL ORTEGA and BENJAMIN ORTEGA, ) Case No.: C 07-02659 JCS (ADR)  
 12 Plaintiffs )  
 13 vs. ) DECLARATION OF BRENDA D.  
 14 CITY OF OAKLAND, et al., ) POSADA IN SUPPORT OF  
 15 Defendants. ) OPPOSITION TO DEFENDANTS'  
 16 ) MOTION TO STRIKE AND  
 17 ) DEFENDANTS' MOTION FOR  
 18 ) SANCTIONS  
 19 )  
 20 ) FRCP 12(f); RULE 11  
 21 ) Date: September 19, 2008  
 22 ) Time: 9:30 a.m.  
 23 ) Dept: Courtroom A, 15<sup>th</sup> Floor  
 24 ) The Honorable Joseph C. Spero  
 25 ) Trial Date: December 1, 2008

26 I, Brenda D. Posada, declare:

27 1. I am an attorney admitted to practice law before all the courts of California and this court, and am an associate of the law firm, Law Offices of Steven R. Jacobsen, attorneys of record for the plaintiffs herein. I have personal knowledge of the facts set forth in this declaration, and the documents attached to this affidavit and, if called to testify, could testify thereto.

28 2. I have been informed and believe, that the inclusion of the Ninth Cause of Action was not made in bad-faith and was only added after Ms. Douat, former associate for the Law Offices of Steven R. Jacobsen and former counsel of record, inadvertently excluded it from the First Amended Complaint. At no time prior, had the court instructed plaintiffs' counsel to delete it.

1       3.     Moreover, I was always willing to cooperate with defense counsel and agree to any  
2 extensions and had they expressed an interest in an extension of the fact discovery cutoff, I would  
3 have likewise provided the same. Although I made a good-faith attempt to meet and confer with  
4 defendants in this regard, my June 26, 2008 letter was ignored. See my letter, attached as Exhibit G  
5 to the Vose Declaration. Defendants simply filed their motion for sanctions and their motion to  
6 strike. (See Doc#64-8.)

7       4.     Defendants argue that sanctions are warranted because, contrary to the court's order,  
8 the inclusion of Ninth Cause of Action is strictly prohibited. But the Order attached as defendants'  
9 Exhibit B to their Request for Judicial Notice speaks for itself. Specifically, that Order provides:

10           By 11/28/07, Plaintiff shall file and serve his first amended complaint to add  
11 only Officer B. Ortiz as a Defendant in this action.

12           (See Doc# 62-3) I am informed and believe that plaintiffs' counsel in good-faith interpreted  
13 this to mean that Officer Ortiz was the ONLY defendant that could be added. But the order is  
14 silent with respect to causes of action. If the Ninth Cause of Action never existed prior to the  
15 Second Amended Complaint, it would have been improper, without first requesting leave of court,  
16 to then add the Ninth Cause of Action. However, that cause of action had already been included in  
17 the initial complaint, and the defendants knew it and had notice of it.

18       5.     The initial complaint was served on June 7, 2007 and a few weeks later, on June 27,  
19 2007, defendants filed their 12(b)(6) motion regarding plaintiffs' Second and Tenth Causes of  
20 Action. Defendants did not bring a 12(b)(6) motion against the Ninth Cause of Action. (See  
21 Doc#5.) It should have been clear that the later omission of the Ninth Cause of Action was simply  
22 an oversight. Of course, defendants' most likely hoped to benefit from the oversight but ultimately  
23 that would not have been in the interests of justice.

24       6.     I am informed and believe that plaintiffs' counsel never intended to disobey, nor did  
25 they disobey, any court order and in fact the court order does not indicate not to include any other  
26 cause of action. Plaintiffs' counsel never intended to harass or cause unnecessary delay or needlessly  
27 increase the cost of litigation. I am informed and believe that plaintiffs' counsel simply acted in the  
28 best interest of our client to correct the omission previously made. The Ninth Cause of Action, had

1 the omission not occurred, would still be in the complaint. The claim is warranted by existing law,  
2 and the fact that defendants never moved to dismiss that cause of action in their June 27, 2007  
3 motion to dismiss demonstrates that defendants also agree that the claim is warranted by existing  
4 law.

5 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
6 knowledge and this declaration was executed on July 16, 2008 in Oakland, California.

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9 //s//  
10 BREND A D. POSADA  
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